32

Supreme Court, U.S.
FILED
SEP 8 - 2003
OFFICE OF THE CLERK

No. 02-1315

In The Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, et al.,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF FLORIDA, THE HONORABLE JOHN ELLIS "JEB" BUSH, GOVERNOR, AND THE FLORIDA DEPARTMENT OF EDUCATION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

CHARLES J. CRIST, JR.
Attorney General of Florida
CHRISTOPHER M. KISE
Solicitor General of Florida
Counsel of Record
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

RAQUEL A. RODRIGUEZ
General Counsel
Office of the Governor
CARLOS MUÑIZ
Special Counsel to the Governor
DANIEL WOODRING
General Counsel
Florida Department of Education

27 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE PROMISE SCHOLARSHIP PROGRAM VIOLATES THE NEUTRALITY REQUIREMENT IMPOSED BY THE FREE EXERCISE AND ESTABLISHMENT CLAUSES 4

A. The Religion Clauses Jointly Mandate Government Neutrality Toward Religion. 4

B. The Promise Scholarship Program Violates the Neutrality Requirement Imposed by the Religion Clauses 6

C. The Promise Scholarship Program Fails Strict Scrutiny Review 8

D. Washington's Defense of Its Program Is Unpersuasive Because the Funding Cases Are Inapposite and the Promise Scholarship Program Is Not a Neutral Law of General Applicability 9

II. THE PROMISE SCHOLARSHIP PROGRAM VIOLATES THE VIEWPOINT NEUTRALITY REQUIREMENT IMPOSED BY THE FREE SPEECH CLAUSE 14

A. The Promise Scholarship Program Should Be Evaluated Under Limited Public Forum Principles. 14

B. The Promise Scholarship Program's Exclusion of Theology Majors Is Classic Viewpoint Discrimination. 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) 8

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 7,13

Braunfield v. Brown, 366 U.S. 599 (1961) 12

Calvary Bible Presbyterian Church v. Board of Regents, 436 P.2d 189 (Wash. 1967) 6

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 5

Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 4

Edwards v. Aguillard, 482 U.S. 578 (1987) 6

Employment Div. v. Smith, 494 U.S. 872 (1990) 5,8,12

Epperson v. Arkansas, 393 U.S. 97 (1968) 4

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 5

Gillette v. United States, 401 U.S. 437 (1971) 12

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 14,16,17

Griswold v. Connecticut,
381 U.S. 479 (1965) 16

Harris v. McRae, 448 U.S. 297 (1980) 10

Holmes v. Bush, No. CV 99-3370, 2002 WL 1809079
(Fla. Cir. Ct. Aug. 5, 2002) 1

Johnson v. Presbyterian Homes of Synod, Inc.,
239 So. 2d 256 (Fla. 1970) 2

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 14,16,17

Lynch v. Donnelly, 465 U.S. 668 (1984) 5,7

Maher v. Roe, 432 U.S. 464 (1977) 10,11

McDaniel v. Paty, 435 U.S. 618 (1978) 5

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 10

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) 10

Rosenberger v. Rector and Visitors of the Univ. of Va.,
515 U.S. 819 (1995) ..... *passim*

Rust v. Sullivan, 500 U.S. 173 (1991) 9,11

Sherbert v. Verner, 374 U.S. 398 (1963) 4

United States v. Lee, 455 U.S. 252 (1982) 12

Wallace v. Jaffree, 472 U.S. 38 (1985) 6

Widmar v. Vincent, 454 U.S. 263 (1981) 8,14,16,17

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1,13

UNITED STATES CONSTITUTION

U.S. Const. amend. I (Establishment Clause) ..... *passim*

U.S. Const. amend. I (Free Exercise Clause) ..... *passim*

U.S. Const. amend. I (Free Speech Clause) ..... *passim*

INTEREST OF THE AMICI

Amici the State of Florida, Florida Governor Jeb Bush and the Florida Department of Education share a strong commitment to protecting religious liberty and to respecting the religious pluralism of the people of the State of Florida. Amici thus have an interest in ensuring that individuals are not excluded from otherwise available government benefit programs solely on the basis of religion.

Amici also have an interest in this case because of pending litigation over Florida's Opportunity Scholarship Program ("OSP"), enacted in 1999 as part of a comprehensive education reform package. The OSP provides scholarships to students in failing schools and allows them to use their scholarships at any eligible public or private school. The OSP's school eligibility criteria make no distinction between secular and religious private schools.

Raising claims under the constitutions of both Florida and the United States, various interest groups and individuals challenged the OSP shortly after it went into effect. The plaintiffs abandoned their federal Establishment Clause claim after this Court issued its decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Nonetheless, a Florida trial court ultimately held that, by allowing students to spend their scholarship funds at religious schools, the OSP violates Article I, section 3 of the Florida Constitution ("Article I, section 3"). *See Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002). In relevant part, Article I, section 3 provides: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian

institution." An appeal of this decision is currently pending before a state district court of appeal.

Amici have argued in the appeal that the trial court failed to apply Florida Supreme Court case law holding that Article I, section 3 is not violated when religious institutions incidentally benefit from a neutral program that is of general applicability and has a secular purpose. *See, e.g., Johnson v. Presbyterian Homes of Synod, Inc.*, 239 So. 2d 256 (Fla. 1970). Rather than follow controlling precedent, the trial court adopted an interpretation of Article I, section 3 that jeopardizes numerous other Florida social programs, including the McKay Scholarship program. That program allows over ten thousand students with disabilities to attend private schools of their parents' choice.

Amici have further argued in the appeal that the trial court's construction of Article I, section 3 unnecessarily creates a conflict between the Florida Constitution and the U.S. Constitution. Specifically, the trial court read the Florida Constitution as requiring the state to violate the U.S. Constitution by discriminating against students who would choose to spend their Opportunity Scholarships in pursuit of a religious education.

Amici thus have a significant interest in this Court's clarification of whether a state scholarship program that funds both public and private education may, consistent with the U.S. Constitution, exclude those students who choose a private religious education.

SUMMARY OF ARGUMENT

The Free Exercise and Establishment Clauses together mandate government neutrality toward religion. Washington's scholarship program violates this neutrality mandate in two ways. First, the program uses a religious classification as a basis for the denial of an otherwise available government benefit by excluding students who choose to major in theology. Second, the program evinces hostility toward religion and stigmatizes students who choose to engage in religious inquiry by funding literally every course of study other than theology. The program's express reliance on a religious classification to deny a government benefit distinguishes this case from those in which this Court has upheld government programs that, for reasons having nothing to do with religion, declined to fund constitutionally protected activities. The program's use of a religious classification also distinguishes this case from those involving the Court's review of neutral laws of general applicability that only incidentally affected religious adherents.

The Promise Scholarship program's exclusion of students who choose to major in theology also violates the viewpoint neutrality requirement imposed by the Free Speech Clause. Applying the limited public forum doctrine, this Court has repeatedly held that government may not deny religious speakers access to otherwise available facilities. Significantly, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court invoked limited public forum principles to invalidate a state university policy that excluded religious publications from an otherwise available *funding* program. The Promise Scholarship program is constitutionally indistinguishable from the program that the Court in *Rosenberger* found unconstitutional. The First Amendment equally protects freedom of speech and freedom to learn, and the government has no legitimate interest in discriminating on the basis of religious viewpoint in either context. For the same

reasons that government may not deny religious speakers access to otherwise available facilities and funds, it also may not exclude an otherwise eligible student from a state-funded scholarship program solely on the basis of the student's choice to pursue a religious education.

ARGUMENT

I. THE PROMISE SCHOLARSHIP PROGRAM VIOLATES THE NEUTRALITY REQUIREMENT IMPOSED BY THE FREE EXERCISE AND ESTABLISHMENT CLAUSES.

A. The Religion Clauses Jointly Mandate Government Neutrality Toward Religion.

"The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968). This neutrality requirement is derived from both the Establishment Clause and the Free Exercise Clause. *See Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). The neutrality principle so informs this Court's jurisprudence that the Court has invoked it to explain the constitutional requirement that government, in rare cases, may exempt a religious adherent from a law of general applicability. *See Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (constitutionally-required accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences").

The neutrality requirement leads to two subsidiary principles, both of which are offended by Washington's Promise Scholarship program. The first is that, "[b]eyond [the] limited situations in which government may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Consistent with this principle, a basic tenet of this Court's Free Exercise Clause jurisprudence is that "government may not . . . impose special disabilities on the basis of religious views or religious status." *See also Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). When the government does take action based on a religious classification, its action is subject to strict scrutiny. *See id.* at 886 n.3. And "[a] law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

The second principle, which is derived primarily from this Court's Establishment Clause jurisprudence, is that government may not take actions that, in purpose or effect, either endorse or disapprove of religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688 (O'Connor, J., concurring). To be sure, most of this Court's cases interpreting the Establishment Clause have presented the question whether government action has impermissibly favored religion. But this Court's jurisprudence leaves no doubt that the Establishment Clause equally forbids governmental disapproval of or hostility toward religion. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap

religions, than it is to favor them."); *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting) ("[W]e have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to *advance* religion, but also that intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion"); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) ("For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion.").

B. The Promise Scholarship Program Violates The Neutrality Requirement Imposed By The Religion Clauses.

Washington's Promise Scholarship program violates both of the subsidiary principles of neutrality. First, it denies students access to an otherwise available government benefit solely on the basis of a religious classification. Washington's program expressly defines its beneficiaries in reference to religion. Eligible students may choose literally any course of study other than theology, which for purposes of Washington law means "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct." *Calvary Bible Presbyterian Church v. Bd. of Regents*, 436 P.2d 189, 193 (Wash. 1967). Among otherwise eligible students, only those who choose to major in theology are denied a scholarship. Put differently, Washington withholds its subsidy unless and until a student is willing to pursue a secular major. As long as a student remains within a class defined in reference to religion—those students who choose to major in theology—he or she will be denied the scholarship. The neutrality requirement mandated by the Religion Clauses forbids a state from so using a religious classification to deny an otherwise eligible student a government benefit.

Second, by singling out students who major in theology for disfavored treatment, Washington's program conveys a message of governmental hostility toward religion. To an objective observer, a policy that subsidizes *every* course of study other than theology necessarily stigmatizes religious inquiry and those who wish to engage in it. This Court in other contexts has not hesitated to draw the conclusion that religion-based exclusions from otherwise neutral benefit programs signal hostility toward religion. For example, in *Rosenberger*, this Court observed that a state university's discriminatory refusal to fund a religious publication "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. at 845-46. Similarly, a plurality of the Court in *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990), noted that, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Using a religious classification as a basis for exclusion from an otherwise available benefit program communicates a message of hostility to religion even if the state's motivation for enacting the discriminatory policy—to accomplish a strict separation of church and state—is benign. *See, e.g., Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (to determine whether government message endorses or disapproves of religion, Court must consider objective effect of message in the community). A state cannot, consistent with the neutrality requirement, adopt a policy that has the objective effect of stigmatizing students who choose a religious education.

C. The Promise Scholarship Program Fails Strict Scrutiny Review.

Because it employs a religious classification to deny an otherwise available government benefit, the Promise Scholarship program is subject to strict scrutiny. *See Smith*, 494 U.S. at 886 n.3. Tellingly, Washington does not even argue that its policy could pass that test. The reason is that such an argument is precluded by this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). In that case, the Court found that a state university violated the Free Speech Clause by excluding a religious group from an otherwise open forum. In defense of its discriminatory policy, the state had asserted an interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution." *Id.* at 277. The Court nonetheless concluded that the university's policy failed strict scrutiny review because the state's interest was "limited by the Free Exercise Clause and . . . by the Free Speech Clause as well." *Id.* at 277-78. Similarly, Washington's interest in pursuing its policy of separation of church and state is insufficient to justify the Promise Scholarship's discrimination against students who choose to major in theology.

The religious liberty guaranteed by the First Amendment is entitled to full protection against encroachment by state law. State policies involving religion need not be uniform, but they must at a minimum respect the neutrality and non-discrimination principles mandated by the Religion Clauses of the U.S. Constitution. State laws that discriminate on the basis of religion should fare no better before this Court than laws that discriminate on other grounds that are constitutionally impermissible. *Cf. Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free

Exercise Clause, the Establishment Clause, the Religious Test Clause, Art VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits.").

D. Washington's Defense of Its Program Is Unpersuasive Because the Funding Cases Are Inapposite and the Promise Scholarship Program Is Not a Neutral Law of General Applicability.

Washington offers two principal arguments in defense of its program. First, the state contends that its policy does not violate the Constitution because this Court has previously held that "the legislature's decision not to fund the exercise of a constitutional right does not infringe that right." (Pet'r Br. at 23) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). Second, Washington maintains that its program is a neutral law of general applicability that simply reflects the distinction between secular and religious instruction, a distinction that has been approved in this Court's jurisprudence. Neither of these defenses is persuasive.

The first argument fails because it does not address the asserted constitutional defect in Washington's policy. The problem with the policy is not that it violates a supposed right to a state-subsidized religious education. Neither the Free Exercise Clause, nor any other provision of the Constitution, confers such a right. The policy is unconstitutional because it uses a religious classification as a basis for exclusion from an otherwise generally available government benefit program. The program thus violates the neutrality requirement embodied in the Religion Clauses.

The conclusion that Washington's program unconstitutionally discriminates against students who choose religious instruction is tied closely to the specific structure of the program. It would make a constitutionally significant difference if, for example, Washington had decided only to fund scholarships at public colleges and universities. One of the results of such a decision would be that the state would not subsidize theological instruction (per Washington's definition). But Washington would have achieved that objective through a religion-neutral—and constitutionally permissible—policy that distinguishes between public and private education. A student challenging such a program based on the Religion Clauses would not have a viable claim, because the program would not have used a religious classification as a basis for discriminatory treatment.

The funding cases that Washington cites in support of its argument are irrelevant precisely because none involved the government's use of religion as a basis for granting or denying an otherwise generally-available benefit. In *Maher v. Roe*, 432 U.S. 464 (1977), *Harris v. McRae*, 448 U.S. 297 (1980), and *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld funding programs that favored childbirth over abortion. In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court upheld a Congressional tax subsidy that favored non-lobbying activities over lobbying, and that favored veterans' groups over non-profit organizations dedicated to other causes. In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court evaluated Congress' use of "general standards of decency and respect for the diverse beliefs and values of the American public" as criteria for evaluating grant applications. None of these cases sheds any light on the question whether government may use a religious classification as the basis for exclusion from a benefit program.

The abortion cases in particular highlight the weakness of Washington's argument. In *Maher*, for example, the Court noted that the abortion right "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474. Similarly, the Court in *Rust* observed that "Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." 500 U.S. at 193. The Court made this statement even while acknowledging that, by using its funding power to further its chosen goals, the government "necessarily discourages alternative goals." *Id.* at 194.

This type of analysis is inapplicable in a case that implicates the neutrality requirement mandated by the Religion Clauses. Consider the above-quoted passage from *Maher*, if applied to the classifications at issue in this case: "The First Amendment implies no limitation on the authority of a State to make a value judgment favoring [students who would use a subsidy to pursue a secular major] over [students who would use a subsidy to pursue a religious major], and to implement that judgment by the allocation of public funds." Such a statement could not be reconciled with the Religion Clauses' neutrality mandate. Similarly implausible is the notion that this Court would countenance the government's decision to "discourage" private individuals' pursuit of religious instruction. In any event, the Court in *Maher* itself alluded to the significant difference between the abortion right and religious liberty when it distinguished abortion from "the significantly different context of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Id.* at 474 n.8.

Washington's second principal defense is that its scholarship regulations are a "neutral law of general applicability." For that reason, Washington contends, the Promise Scholarship program does not violate students' free exercise rights, and the program should not be subject to strict scrutiny.

Washington's characterization of its scholarship program defies both common sense and this Court's jurisprudence. The analytical concept of a "neutral law of general applicability" is most closely associated with this Court's decision in *Smith*, 494 U.S. 872. The Court in that case used the term to describe an Oregon law that generally prohibited drug use. Other cases that the *Smith* majority characterized as involving neutral laws of general applicability include *United States v. Lee*, 455 U.S. 252 (1982) (law requiring payment of Social Security taxes); *Gillette v. United States*, 401 U.S. 437 (1971) (law establishing the military selective service system); and *Braunfield v. Brown*, 366 U.S. 599 (1961) (Sunday closing laws). Each of the laws at issue in these cases incidentally affected religious practices, but none even mentioned religion, and none was passed with an intent to affect religion in any way. By contrast, the Promise Scholarship program facially discriminates on the basis of religion and reflects a conscious effort to enforce a government policy prohibiting the use of public funds for religious instruction. The "neutral law of general applicability" line of cases is thus inapposite.

Similarly unpersuasive is Washington's contention that its policy is neutral because it simply reflects the constitutionally permissible distinction between secular and religious instruction. While this distinction may have relevance when evaluating education or educational materials offered by the government itself, it has no application here. In a program like the Promise Scholarship, there is no possibility that students' educational choices will be attributed to the government. As this Court

explained in *Zelman*: "[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 654-55.

Washington therefore cannot reasonably fear that funding *any* major—including theology—chosen by an eligible student would result in governmental endorsement of religion. To the contrary, a program that otherwise allows students to choose any course of study must include students majoring in theology if the program is to comply with the Constitution's neutrality mandate: "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839. At bottom, Washington's argument ignores the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

II THE PROMISE SCHOLARSHIP PROGRAM VIOLATES THE VIEWPOINT NEUTRALITY REQUIREMENT IMPOSED BY THE FREE SPEECH CLAUSE.

A. The Promise Scholarship Program Should Be Evaluated Under Limited Public Forum Principles.

Washington's Promise Scholarship program is unconstitutional for the further reason that it discriminates against religious expression, in violation of the Free Speech Clause. Specifically, the nature of the program brings it within the limited public forum doctrine, and its exclusion of students who major in theology is a form of viewpoint discrimination.

The limited public forum doctrine holds that the government is subject to First Amendment limitations when it voluntarily provides its resources to facilitate private expression. In most of this Court's limited public forum cases involving religious expression, the resource provided by the government was an actual meeting place. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar*, 454 U.S. 263. But in *Rosenberger*, 515 U.S. 819, the Court applied the limited public forum doctrine to a funding program that subsidized the printing costs of student publications.

Regardless of whether the forum consists of a meeting place or a funding program, the Free Speech Clause imposes two basic limitations on government's ability to restrict access to that forum. A "restriction must not discriminate against speech on the basis of viewpoint." *Good News*, 533 U.S. at 106. And "the restriction must be reasonable in light of the purpose served by the forum." *Id.* at 107 (internal quotation marks and citation

omitted). Washington's Promise Scholarship program fails both of these tests.

The conclusion that the Promise Scholarship program violates the Free Speech Clause is compelled by this Court's analysis in *Rosenberger*. The funding program at issue in that case had been created to subsidize the activities of groups "related to the educational purpose of the University of Virginia." *Rosenberger*, 515 U.S. at 824 (internal quotation marks omitted). Among other things, the program subsidized the printing costs of a variety of student publications. However, the university had a policy that no money from the fund could be used for "religious activity," which the policy defined as "any activity that primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825 (internal quotation marks omitted). Based on this policy, the university refused to pay the printing costs of a student publication that addressed issues from a Christian editorial perspective.

The Christian student group sued, and this Court ultimately invalidated the university's funding program. The Court first concluded that the program was a limited public forum, albeit "more in a metaphysical than in a spatial or geographic sense." *Id.* at 830. The Court then held that the university had engaged in impermissible viewpoint discrimination by denying funding on the basis of the publication's religious editorial viewpoint. *See id.* at 836-37.

Limited public forum principles should apply to Washington's Promise Scholarship program for the same reason that the Court applied them to the funding program at issue in *Rosenberger*. Each program was established by the government to facilitate private expression. In *Rosenberger*, the subsidized expression consisted of student publications. Washington's scholarship program subsidizes the pursuit of learning. For purposes of the First Amendment, this is a distinction without a

difference, because the Free Speech Clause protects both types of expression from governmental interference. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.") (internal citations omitted). Just as the government has no legitimate interest in regulating student speech on the basis of viewpoint, so too it has no such interest in adopting viewpoint-based regulations that affect students' choice of what to study.

B. The Promise Scholarship Program's Exclusion Of Theology Majors Is Classic Viewpoint Discrimination.

Because the Promise Scholarship program is governed by limited public forum principles, its discrimination against students who choose to major in theology violates the Free Speech Clause. First, under this Court's decisions in *Good News, Rosenberger, Lamb's Chapel,* and *Widmar*, Washington's policy of excluding theology majors from its scholarship program is a classic form of viewpoint discrimination. In fact, Washington candidly acknowledges that its funding restriction does not apply to religion as a subject matter, but only to religion taught from a devotional or faith-based perspective. (Pet'r Br. at 5-6). *Cf. Rosenberger*, 515 U.S. at 831 ("By the very terms of the [funding] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

Second, and perhaps more fundamentally, it is unreasonable to exclude students who major in theology from a program broadly dedicated to making a college education more affordable for low and middle-income students. *See Good News*,

533 U.S. at 122 (Scalia, J., concurring) ("Lacking *any* legitimate reason for excluding the Club's speech from its forum—'because it's religious' will not do—respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject-matter limits must at least be reasonable in light of the purpose served by the forum.") (internal citations and quotation marks omitted). The government has no legitimate interest in encouraging students to choose a secular major over a major in theology.

Washington was not required to establish the Promise Scholarship program. But "[h]aving done so, [it] has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. The same First Amendment principles that preclude government from denying religious speakers access to generally available facilities or funds (*see Good News, Lamb's Chapel, Widmar, Rosenberger*) prohibit Washington from excluding otherwise eligible theology majors from its scholarship program.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General of Florida

CHRISTOPHER M. KISE
Solicitor General of Florida
Counsel of Record
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

RAQUEL A. RODRIGUEZ
General Counsel
State of Florida, Office of the Governor

CARLOS G. MUÑIZ
Special Counsel to the Governor
State of Florida, Office of the Governor

DANIEL WOODRING
General Counsel
Florida Department of Education